# CONSERVATION LAW FOUNDATION

October 1, 2008

Philip Giudice, Commissioner
Massachusetts Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

**Re: Comments – RPS Import Feasibility**

Dear Commissioner Giudice:

The Conservation Law Foundation (CLF) appreciates this opportunity to submit comments in connection with the Department of Energy Resources' (DOER) assessment of the feasibility of instituting capacity and "netting" requirements as conditions for Massachusetts Renewable Portfolio Standard (RPS) eligibility for electricity imported into the ISO-New England (ISO-NE) control area from renewable generators located in control areas outside of and adjacent to ISO-NE, pursuant to Section 105 of chapter 169 of Acts of 2008 (the "Green Communities Act").

As an initial matter, it is important to note that the Massachusetts General Court took rather extraordinary action in requiring DOER to undertake a feasibility determination before adopting any new regulations that would require imported renewable energy to meet certain new "capacity" or "netting" requirements in order to qualify for the Massachusetts RPS. When the legislature was considering these requirements as part of the Green Communities Act, serious issues were raised about their legal and practical feasibility – and the legislature ultimately declined to resolve these issues. The Green Communities Act not only specifically requires DOER to assess the feasibility of the capacity and netting provisions (Green Communities Act Section 105, subsection g),[1] but also leaves open the real possibility that DOER may determine that such requirements are *infeasible*. According to Section 105, subsection (h), the capacity and netting requirements may take effect only if DOER finds that they are feasible.[2]

We appreciate that DOER is soliciting broad stakeholder input in making this threshold feasibility determination.

[1] "The department shall assess the feasibility of implementing subsections (c) and (e) and report its findings along with proposed regulations for implementing these subsections in accordance with section 12 of chapter 25A, on or before November 1, 2008."

[2] "Subsections (c) and (e) shall take effect, subject to the provisions of section 12 of chapter 25A, after the report required under subsection (g) has been filed *if* the department has determined that it is feasible to implement these subsections." (Emphasis added).

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In making the requisite determination, DOER should construe the term "feasibility" in accordance with its plain meaning, including practical and legal feasibility. The term "feasible" means "capable of being done or carried out," "suitable" or "practicable."[3]
CLF's comments focus primarily on *legal* feasibility of the provisions under consideration.

CLF supports efforts to prevent any "gaming" of the Massachusetts RPS. However, we believe that existing rules with respect to RPS qualification for renewable energy imported into the hISO-New England control area[4] strike an appropriate balance and, as discussed below, we do not believe it is feasible to adopt or implement the capacity or netting requirements in subsections (c)(3) and (e) of Green Communities Act Section 105. Simply put, the capacity and netting requirements manifestly discriminate against imports of renewable energy, are not justified by valid considerations unrelated to economic protectionism, and, as such, are legally infeasible. These requirements are not "suitable" or "capable being done or carried out" because they run afoul of the dormant Commerce Clause, as discussed below.

To be clear, CLF enthusiastically supports the drive for significant expansion of clean renewable energy generation in Massachusetts that presumably underlies the proposed restrictions on RPS eligibility for renewable energy imports. However, we strongly believe that alternative affirmative and non-discriminatory tools – including long-term contracts and reasonable renewable energy facility siting reforms – should be deployed in *lieu* of questionable protectionist measures.

[3] Dictionary.com Unabridged (v 1.1),Random House, Inc., http://dictionary.reference.com/browse/feasibility (accessed: October 1, 2008); The American Heritage Dictionary of the English Language, Fourth Edition, Houghton Mifflin Company, 2004, http://dictionary.reference.com/browse/feasibility (accessed: October 1, 2008); Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/feasibility (accessed: October 1, 2008).

[4] These rules include the requirements of 225 CMR 14.05(5), "Special Provisions for a Generation Unit Located Outside of the ISO-NE Control Area." In accordance with these existing requirements, electrical energy output from generation located outside of the ISO-NE Control Area may qualify for the Massachusetts RPS only if (a) the purchaser of the electricity is located in the ISO-New England Control Area and associated transmission rights are secured; (b) the electrical energy is settled in the ISO-NE Settlement Market System; (c) the amount of Megawatt hours (MWhrs) produced is verified by the NEPOOL GIS administrator; (d) the electrical energy must receive a North American Electric Reliability Council (NERC) Tag confirming transmission from the originating Control Area to the ISO-NE Control Area; and (e) "double-counting" is prohibited (i.e., the same electrical energy cannot be used to qualify for the Massachusetts RPS while also being used to satisfy obligations in any other jurisdiction).

**Green Communities Act Section 105(c)(3) and (e), if implemented, would create competitive disadvantages or barriers to imported renewable energy.**

Section 105 (c)(3)'s "capacity" commitment condition would be difficult if not impossible to meet.

On its face, Green Communities Act Section 105(c) would impose conditions on RPS eligibility for renewable energy imported from control areas adjacent to ISO-New England that would not apply to renewable energy generated within the ISO-New England Control Area. Specifically, this provision directs that – if determined feasible by DOER – renewable energy imported into ISO-New England from an adjacent control area would have to be committed as a "capacity" resource:

> [Imported renewable energy] shall *not* qualify under the renewable portfolio standard, notwithstanding such delivery into the ISO -NE control area, *unless the generator of such renewable energy*: (1) initiates the import transaction pursuant to a spot market sale into the ISO -NE administered markets or under a bilateral sales contract with a purchaser of the renewable energy located in the ISO -NE control area by properly completing a North American Electric Reliability Corporation tag from the generator in the adjacent control area to either a node or zone in the ISO -NE control area; (2) complies with all ISO -NE rules and regulations required to schedule and deliver the renewable energy generating source's energy into the ISO -NE control area; and (3) *commits the renewable generating source as a committed capacity resource for the applicable annual period.*

Green Communities Act Section 105(c) (emphasis added).

Requiring importing renewable energy generators to make capacity commitments through the ISO-New England Forward Capacity Market (FCM) would make it difficult if not impossible for their energy to qualify for the RPS, given how the FCM is structured. To participate in any of the Forward Capacity Auctions (FCAs) and secure a capacity commitment, an importing generator would need to submit a "show of interest" more than three years in advance, and then successfully bid into the relevant auction. An importing generator likely would be precluded from participating in the FCM for its first three years of operation, from June 2010 through May 2013, given that the auctions (FCA1 through FCA3) that will define FCM participation during that period have already commenced and other relevant deadlines for participation have passed. For example, FCA1 (addressing capacity requirements for the period June 2010 to May 2011) was held in February 2008 and was over-subscribed.

It is possible, yet unlikely, that imported renewable energy could qualify through "Reconfiguration Auctions" if there is a need for additional capacity beyond what is secured in FCA1 through FCA3. Such Reconfiguration Auctions are intended as a balancing market for small residual needs, and there is no guarantee that they will occur or accommodate any significant additional capacity.

Even beyond these FCM hurdles during the 2010 – 2013 timeframe, variable output renewable energy resources located in control areas adjacent to ISO-New England will face particular barriers to participation in the FCM. Unlike resources located within the ISO-New England control area, whose electric generation output is settled in the ISO-New England Market on an "as generated" basis, variable output resources (like wind generation) imported into the ISO-New England control area and seeking to participate in the FCM must comply with daily bidding and scheduling requirements pursuant to the Day Ahead and Real Time Markets. In addition, external resources are financially responsible for any differences between day-ahead commitments and real-time output. Renewable energy resources located within the ISO-New England control area thus would continue to have significant advantages over external resources (particularly variable output resources) in the FCM due to this disparity in scheduling flexibility, administrative burden and financial risk.

Importantly, Section 105(c)(3)'s capacity commitment condition also would be expected to have significant negative impacts on existing contracts for the purchase of power and Renewable Energy Certificates (RECs) from renewable energy generators in adjacent control areas, such as NSTAR Electric's ten-year contract with the Maple Ridge wind energy facility in New York that was approved this year by the Massachusetts Department of Public Utilities after a lengthy proceeding. Order Approving Long-term Wind Contracts and Renewable Energy Program for NSTAR Electric Company, DPU 07-64-A (April 30, 2008). Imposing a new capacity commitment condition would at best disrupt and at worst terminate such commitments, a result that would be both profoundly inequitable and anathema to the clean energy goals set forth in the Massachusetts RPS.

<u>Section 105(e)'s "netting" requirement poses administrative barriers and, even if possible to implement, would create a significant competitive disadvantage for renewable energy from adjacent control areas.</u>

Subsection (e) similarly imposes a "netting" restriction that would uniquely apply to, and restrict, RPS qualification for imported renewable energy:

> (e) The renewable portfolio standard credit applicable to the eligible renewable energy as determined under subsection (d) *shall be reduced by any exports of energy from the ISO -NE control area made by the person seeking renewable portfolio credit for such renewable energy or any affiliate of such person, or any other person under contract with such person to export energy from the ISO -NE control area* and deliver such energy directly or indirectly to such person.

This provision, if implemented, would allow generators to qualify their imported renewable energy for RECs only "net" of their – or their affiliates' or contracting partners' – energy exports. This provision not only would add a substantial further penalty on imported clean energy, but is so broad and vague that it appears impossible to responsibly track and implement. Even if an importing generator's affiliates and contracting partners could be ascertained credibly,

tracking such imports and exports presumably would require significant enhancements to the NEPOOL-GIS system and likely would be prohibitively expensive to implement.

**The "capacity" and "netting" conditions are infeasible because they would run afoul of the Commerce Clause.**

The power to regulate interstate and international commerce is vested with Congress in accordance with the U.S. Constitution. The Commerce Clause of the Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3.[5] An extensive body of Supreme Court and other jurisprudence has recognized that, in granting such authority to Congress, the Commerce Clause also necessarily invokes an inherent limitation on state regulation. Thus, the "dormant" Commerce Clause precludes states from adopting protectionist measures that would promote local industry by discriminating against goods originating beyond their borders. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). Indeed, the Massachusetts RPS, as implemented to date, reflects this important principle – in that renewable energy resources from throughout the region have been qualified as eligible RPS resources and regularly contribute to meeting the RPS' increasing targets.

In evaluating a dormant Commerce Clause challenge, a court first looks at the language of a state statute to determine if the statute is facially discriminatory or neutral. If the statute is facially discriminatory, then the statute is presumed unconstitutional. Id. at 624. In fact, where a state statute is facially discriminatory against insterstate commerce, a "virtually per se rule of invalidity" applies,[6] and such statutes are "routinely struck down." New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988) (striking down a statute providing tax credits to ethanol produced in-state). Indeed, they are "typically struck down without further inquiry." Chemical Waste Mgmt, Inc. v. Hunt, 504 U.S. 334, 342 (1992). The presumption of unconstitutionality can only be rebutted if the state can demonstrate that the discriminatory measure advances a "legitimate local purpose" for the statute that cannot be "adequately served by reasonable non-discriminatory alternatives. " Oregon Waste Sys., 511 U.S. 93, 101; Wyoming v. Oklahoma, 502 U.S. 437 (striking down a statute requiring in-state utilities with coal-fired generators to purchase 10 percent of their coal from in-state sources); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (striking down a NH PUC order restricting the sale of hydropower).[7]

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[5] Inappropriate state interference in international commerce, including with respect to sales of electricity, is also prohibited by the North American Free Trade Agreement (NAFTA). NAFTA Articles 301 and 608. However, since the U.S. Constitution's Commerce Clause applies both to interstate and international trade, and itself precludes the sort of discriminatory treatment in question here, this comment letter does not extend into analysis of NAFTA considerations.

[6] Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992)(quoting Philadelphia v. New Jersey, 437 U.S. at 624); Oregon Waste Sys. Inc. v. Dept. of Envtl. Quality of Or. 511 U.S. 93, 100 (1994); Alliance for Clean Coal v. Miller, 44 F.3d 591, 595 (7th Cir. 1995).

[7] An alternative standard, the so-called "Pike" test, is applied where a state statute "regulates even-handedly to effectuate a legitimate local public interest" and has only incidental impacts on interstate commerce. In such instances – which is not the case here, given the manifestly discriminatory treatment of renewable energy imports – a state statute will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), and nondiscriminatory alternatives are unavailable. Hunt v. Washington State, 432 U.S. at 353.

Section 105(c) and (e), if implemented, require that renewable energy delivered in New England from generating sources located in an adjacent control area will not qualify under the MA RPS unless the "capacity" and "netting" criteria discussed above are met. Thus, renewable energy generators located in Massachusetts would be treated differently – and more favorably – than renewable energy generators located outside of Massachusetts and the ISO-New England control area. The statute is manifestly discriminatory and would create a competitive disadvantage to out-of-state renewable energy generation, making the statute vulnerable to a constitutional challenge.

It is of no consequence that the "capacity" and "netting" conditions would discriminate only against renewable energy generators located outside of the ISO-New England control area rather than drawing a line directly at the Massachustts border. The relevant inquiry is whether the statute discriminates against *some* out-of–state companies. Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 349-51 (1977) (where the Court struck down a state statute that negatively affected apple growers in some states, but not others, and impaired their ability to compete against local growers). Here, the provisions would discriminate against renewable energy generators located in adjacent control areas in New York and Canada.

Given the statute's facial discrimination and the significant impediments the "capacity" and "netting" requirements would entail for renewable energy imports, the statute is presumed invalid and somehow must be shown to advance a "legitimate local purpose" that cannot be "adequately served by reasonable nondiscriminatory alternatives" for it to pass constitutional muster. Oregon Waste Sys., 511 U.S. at 101 (citing New Energy Co. v. Limbach, 486 U.S. at 278). This test has not been met for a number of reasons, including the following:

1. Even if the capacity and netting restrictions were motivated by a desire to promote greater certainty in the market for RECs and an interest in promoting renewable energy development in Massachusetts, these goals are not sufficient justifications for erecting import barriers – nor are these goals likely to be served if the capacity and netting requirements were embraced. Given the capacity and netting provisions' vulnerability to legal challenge, implementation of these provisions likely would significantly *undermine* market certainty.

2. Regulations imposing a significant competitive disadvantage on renewable energy generators seeking to sell clean power into Massachusetts markets from adjacent control areas would discourage much-needed renewable energy development in the region and threaten to extend Massachusetts' dangerous reliance on polluting fossil fuel-fired generation, thus undermining core goals of the RPS as well as the newly enacted Massachusetts Global Warming Solutions Act.

3. Impediments to imports of renewable energy will likely increase Alternative Compliance Payments (ACP) while reducing actual reliance on clean energy resources. Although ACP funds until recently were directed specifically to be used for maximizing new renewable energy generation (with marginal success), that is no longer the case. In accordance with Section 93 of the Green Communities Act, ACP funds have been

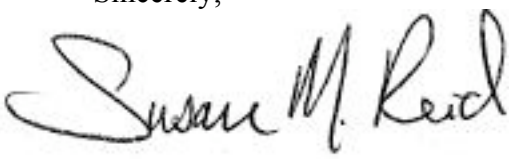
redirected toward a far more expansive mandate, and DOER is now directed to use these funds to support: (a) the Green Communities program; (b) state or community college energy programs; (c) flywheel energy storage technologies; and (d) paper derived fuels. While we hope that ACP funds will be deployed – first and foremost – to advance renewable energy deployment, this will not necessarily be the case, given the new mandate. Even then, measures beyond funding are needed to overcome other challenges to local renewable energy projects.

4. There are substantial as-yet unexplored non-discriminatory alternatives for promoting renewable energy development in Massachusetts. These alternatives include long-term contracts (through the five-year pilot program under the Green Communities Act and beyond) and renewable energy facility siting reforms that are widely viewed as an important next step.[8]

In light of the foregoing, CLF respectfully asks the Department to find that subsections (c)(3) and (e) of Section 105 of the Green Communities Act are legally infeasible and to refrain from adopting any capacity market or "netting" requirements that would serve as barriers to imports of clean renewable energy.

Thank you for the opportunity to provide these comments.

Sincerely,



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[8] The recent study, "Massachusetts Renewable Energy Potential: Final Report" (August 6, 2008) ("Navigant Study"), prepared by Navigant Consulting, Inc. for DOER and the Massachusetts Technology Collaborative, is encouraging – yet it should be considered in the context of its own admission that it does not attempt to predict the most likely future outcomes. Navigant Study at pp. 2, 5. Among other things, the study expressly did not take into account siting/permitting challenges that are highly relevant to any credible projections for actual deployment of new renewable energy generation facilities.